if it considers them to be true. It is important, in my view, for the trial Magistrate to state clearly whether the testimony of a certain witness whom he or she considers as unreliable is to be disregarded completely. In considering the discrepancies the court should take into account the educational background and experience of the witness and whether the witness is describing events which have taken place recently or a long time ago and the demeanour. It was contended by counsel for the appellant that since the learned trial Magistrate had considered P.W.4 as unreliable she should not have called upon the appellant to make his defence. I do not think I can fully agree with counsel on this. The learned trial Magistrate could have made the decision not to call upon the appellant to make his defence. There was, however, evidence apart from the testimony of P.W.4, that the sum of $60/- was in fact received by the appellant. This coupled with the fact that the appellant was a police officer would appear to be sufficient to raise the presumption under section 14 of the Act which reads:–

"where in any proceedings against a person for an offence under section 3 or 4 it is proved that any gratification has been paid or given to or received by a person in the employment of any public body, such gratification shall be deemed to have been paid or given and received corruptly as an inducement or reward as hereinafter mentioned, unless the contrary is proved."

The defence called one Martin Pandin (D.W.2) who was an Assistant District Officer in Labuan, as a witness. His testimony, if believed, would have corroborated the appellant's story that the $60/- was a repayment of the loan. According to this witness the appellant and his father-in-law came to his office and showed him a document. He called the complainant (P.W.4) to his office and showed the complainant the document. The complainant confirmed that the signature on the document was his and told him that the borrowed money from appellant. The learned trial Magistrate was very careful in considering the evidence given by this witness and came to the conclusion that "it is unsafe to give great reliance on D.W.2's evidence." It is clear from this that the learned trial Magistrate did not reject D.W.2's evidence and still felt that some reliance could be put on such evidence. The burden cast on the appellant to rebut the presumption under section 14 of the Act was a light one. With respect, I think, if some reliance could be put on D.W.2's evidence then the appellant must be said to have succeeded in rebutting such presumption. The reason the learned trial Magistrate did not come to that conclusion was probably due to what she said at page 184 of her judgment:–

"However, even though I'm willing to give D.W.2's story great reliance, I have nevertheless asked myself if D.W.2's testimony would in any manner cast a doubt on the Prosecution's case. My answer to that is in the negative. It is my humble opinion that whatever doubt that could be cast by D.W.2's story on the Prosecution's case as to the guilt of the accused is being negatived by one piece of circumstantial evidence of subsequent conduct which tends to support the guilt of the accused."

Clearly the learned trial Magistrate misdirected herself on the burden cast on the appellant.

For reasons given above I allowed the appeal and I ordered a retrial.

Appeal allowed; Retrial ordered.

Solicitors: *Rayner & Co.*

PUBLIC PROSECUTOR v. JAMES TAN

[A. Cr. J. (Charles Ho J.) January 10, 1983]
[Kota Kinabalu – Criminal Appeal No. 9 of 1982]

Criminal Law & Procedure – Charge of corruption – Prosecution failed to prove prime facie case – Facts more consistent with offence of cheating – Whether learned Magistrate should amend charge to one of cheating.

The prosecution appealed against the order of the learned Magistrate discharging and acquitting the respondent at the close of the prosecution case on a charge under section 3(a)(ii) of the Prevention of Corruption Act 1961. The learned Magistrate found that the prosecution had failed to establish a *prima facie* case against the accused which if unrebutted would warrant his conviction of the offence as charged. The learned Magistrate held that the facts appeared more consistent with the offence of cheating by the accused, rather than corruptly receiving money on account of the income tax officers, and therefore did not call the accused to enter upon his defence.

The learned Deputy Public Prosecutor contended that in the light of the learned Magistrate's finding he ought to have exercised the powers conferred upon him by sections 158 and 173(h) of the Criminal Procedure Code to amend the charge.

Held: (1) where the facts do not establish a *prima facie* case against the accused person on the charge preferred against him but disclose another offence for which he is not charged, the learned President or Magistrate unless he has good reason not to do so, ought to amend the charge;

(2) in the present case the facts as found by the learned Magistrate would point clearly to an offence of cheating having been committed and the learned Magistrate had not given any reason as to why he did not amend the charge;

(3) the learned trial Magistrate was therefore directed to amend the charge against the respondent to one of cheating and the trial was to proceed on the amended charge.

Cases referred to:

(1) *Mohamed Yusof* v. *Public Prosecutor* [1962] M.L.J. 311, 312

(2) *Public Prosecutor* v. *Tan Kim Kang & Ors.* [1962] M.L.J. 388.

(3) *Public Prosecutor* v. *Heng You Nang* [1949] M.L.J. 285, 287.

CRIMINAL APPEAL.

Abdul Malik bin Haji Ishak (Deputy Public Prosecutor) for the appellant.

Cecil Robertson for the respondent.

Cur. Adv. Vult.

Charles Ho J.: This is an appeal by the Public Prosecutor against the order of the learned Magistrate discharging and acquitting the respondent at the close of the prosecution case on a charge under section 3(1)(ii) of the Prevention of Corruption Act 42/61.

In his ruling on January 15, 1982 the learned Magistrate found "the prosecution has failed to establish a *prima facie* case against the accused if unrebutted would warrant his conviction of the offence as per charge." He gave the grounds for his decision on a later date. It would appear from the grounds of decision the learned Magistrate has carefully considered the evidence adduced by the prosecution, in particular the testimony of the main prosecution witness, Chung Chi Han, and he came to this conclusion:

"In sum, my finding is that the accused did ask for the $112,800 and that he (accused) did tell PW2 that the $112,800 was for the paying the real property gains tax and for the income tax officers. But I find no circumstances, from which I can safely infer that the $112,800 was received on account of the income tax officers. That the prosecution must prove this, has been stated in the case of *Mohd. Kassim* v. *Public Prosecutor* [1981] 1 M.L.J. 91, at p. 92, where the court said "For a charge under section 3(a)(ii) of the (Prevention) of Corruption) Act, it is incumbent on the prosecution to prove that the corrupt money was received as gratification on account of officers of a public body."

In my mind, the facts appear more consistent with the offence of cheating by the accused, rather than corruptly receiving money on account of the income tax officers. It is for the above reasons that I did not call the accused to enter upon his defence."

The learned Deputy Public Prosecutor has no quarrel with the conclusion reached by the learned Magistrate that the prosecution failed to establish a *prima facie* case against the accused on a charge under section 3(a)(ii) of the Prevention of Corruption Act. He is, however, of the view that in the light of the learned Magistrate's finding he ought to have exercised the powers conferred upon him by section 158 and section 173(h) of the Criminal Procedure Code to amend the charge. He says he relies mainly on the provisions of section 173(h) which reads:

"(h) If, when such evidence has been taken, the court is of the opinion that there are grounds for presuming that the accused has committed the offence charged or some other offence which such court is competent to try and which in its opinion it ought to try, it shall consider the charge recorded against the accused and decide whether it is sufficient and, if necessary, shall amend the same."

The provisions of section 173(h) were considered by the court in a number of cases. In *Mohamed Yusof* v. *Public Prosecutor*[1] Adams J. said:

"If he found that the evidence did not support the charge as drawn he should as he is in *duty bound to do* under section 173(h) of the Criminal Procedure Code have amended it so that the accused stood charged with knowingly omitting to take such order with a fire as is sufficient to guard against any probable danger to human life."

In *Public Prosecutor* v. *Tan Kim Kang & Ors.*[2] Hashim J said:

"I think a safer and better course would be to follow the provisions of section 173(h), (i) and (j) of Criminal Procedure Code. It is quite clear from these 3 subsections that a President or a Magistrate should make any alteration or amendment to the charge only at the close of the case for the prosecution."

In *Public Prosecutor* v. *Heng You Nang*[3] Spenser Wilkinson J., said:

"Under section 173(h) Subordinate Courts have a duty to consider the charge and amend it if necessary. Nevertheless I do not think that this section makes it incumbent on the court to search the law for offences which an accused person may have committed. It is for the prosecution to decide what their real complaint against the accused is and to frame their charges or to submit amendments accordingly. No doubt in a clear case, a President or a Magistrate ought to alter a charge to fit the proved facts; but if the prosecution is unable to reach a conclusion as to the proper charge, which appears to have been the position in this case, it is in my view quite improper to criticise the President for failing to carry out the functions of the prosecuting officer."

There are other cases apart from the above where the courts considered section 173(h) and the learned Judges all seemed to be of the opinion that the section imposes on the Subordinate Courts a duty to consider the charge and to amend it if necessary. With respect I agree with his Lordship Spenser Wilkinson J. that the section does not make it incumbent on the court to search the law for offences which an accused person may have committed. I would venture furrther by saying that the learned President or Magistrate has a discretion not to amend the charge when to do so would be unjust or an accused person would be prejudiced by such amendment. Whether this is so would depend on the circumstances of each case. However where the facts do not establish a *prima facie* case against the accused person on the charge preferred against him but disclose another offence for which he is not charged, the learned President or Magistrate unless he has a good reason not to do so, ought to amend the charge. In the present case the facts as found by the learned Magistrate would point clearly to an offence of cheating having been committed and the learned Magistrate has not given any reason as to why he did not amend the charge.

It is contended by Mr. Robertson that it would be unjust in the present case to have the charge amended from section 3(a)(ii) of the Prevention of Corruption Act to section 420 of the Penal Code as the latter carries a heavier punishment, a maximum of 7 years' imprisonment and a fine. The learned Deputy Public Prosecutor drew the attention of the court to section 13 of the Provision of Corruption Act which makes it mandatory for the court to order an accused who has been found guilty to pay to the Government the sum which he has received and this is a fine which can be converted into a term of imprisonment in default. He says that this and a maximum sentence of 5 years imprisonment under section 3(a)(ii) of the Prevention of Corruption Act would make the offence a more serious one than the offence of cheating. By making such comparisons both Mr Robertson and the learned Deputy Public Prosecution assumed that in either case the maximum sentence would be imposed by the subordinate court. With respect I do not think we can do that. I see no reason why the court in the presence case cannot amend the charge from section 2(a)(ii) of Prevention of Corruption Act to one of cheating under section 420 of the Penal Code. I do not think that this would cause any injustice to the accused.

For reasons given above the appeal ought to be allowed. Accordingly the learned trial Magistrate is hereby directed to amend the charge against the respondent to one of cheating and the trial to proceed on the amended charge.

Order accordingly.

Solicitors: *Skinner, Lind, Robertson, Pang & Willie.*

FLORENCE BAILES v. DR. NG JIT LEONG

[O.C.J. (Ajaib Singh J.) June 14, 1983]
[Penang – Civil Suit No. 209 or 1981]

Practice & Procedure – Res judicata – Plaintiff obtained interim injunction against defendant – Hearing by another High Court which vacated interim injunction – Whether this amounted to res judicata – Present court held presiding Judge was not functus officio and therefore not precluded from hearing case.

The plaintiff in this case sought a declaration that a 3 months' suspension imposed on her by the Penang Club was null and void. She also sought an injunction to restrain the Committee of the Penang Club from enforcing the suspension. She claimed damages and costs. On June 8, 1981 the plaintiff obtained an interim order restraining the Committee from enforcing the suspension until the trial of her suit. This order was vacated by the late Arulanandom J. on July 7, 1982 (see [1982] 1 M.L.J. 333). In his grounds of judgment the learned Judge went deeper into the matter and made findings which appear to cover all the issues involved in the suit. An appeal was lodged with the Federal Court by the plaintiff but as the 3 month period of suspension had ended the appeal was struck off on the application of counsel for the defendant.

Counsel for the defendant argued that the court could not entertain the plaintiff's suit against the defendant on two preliminary points, *res judicata* and *functus officio*.

Held: (1) the hearing and arguments during the interim injunction stage were not exhaustive for the determination of the issues involved in the suit. The plea of *res judicata* should therefore not prevail and that in the interest of justice there should be a full hearing of the suit itself;

(2) the presiding Judge who would hear the present suit was not *functus officio* and therefore not precluded from hearing the case.

(3) the plea *res judicata* had not been pleaded by the defendant and therefore could not be raised as a preliminary objection to the hearing of the plaintiff's suit.

CIVIL SUIT.

R. J. Manecksha for the solicitors.
N. Chandran for the defendant.

Cur. Adv. Vult.